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IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1962

## No. 847

**ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY,**

*Petitioner,*

vs.

**CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,**

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

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# Supreme Court of the United States

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**ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY,**

*Petitioner,*

VS.

**CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,**

*Respondent.*

---

## Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Armour Research Foundation of Illinois Institute of Technology prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on January 2, 1963.

## CITATIONS TO OPINIONS BELOW.

Judgment of the District Court was entered after a non jury trial and was based on findings of facts and conclusions of law. No opinion was written. The first opinion of the Court of Appeals is reported in 297 F. 2d 176 Appendix A infra p. 13. The second opinion is not yet reported, Appendix A infra p. 18.

## JURISDICTION.

The jurisdiction of this court is invoked on the ground that the United States Court of Appeals for the Seventh Circuit has decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States. The first opinion of the United States Court of Appeals for the Seventh Circuit reversed and remanded the cause to the United States District Court for further findings of fact. The judgment of the United States Circuit Court of Appeals for the Seventh Circuit on the second appeal was entered on January 2, 1963. Jurisdiction to review the judgment in question by Writ of Certiorari is conferred on the Supreme Court of the United States by Title 28 USC, Section 1254.

## QUESTION PRESENTED.

The question presented for review is whether the provisions of Title 49 U.S.C., Section 20(11) and the Uniform Straight Bill of Lading issued pursuant thereto impose on the common carrier of interstate shipments for hire, absent any fraud or deception on the part of the shipper, not only the obligation to safely carry a shipment presented to such carrier for carriage, but also the obligation to determine the nature of the shipment and provide for proper loading of the shipment.

## STATUTES INVOLVED.

Title 49 United States Code, Section 20(11):

"§. 20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim. Any * * * railroad * * * receiving property for transportation * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any * * * railroad * * * to which such property may be delivered or over whose line or lines such property may pass * * * and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such * * * railroad * * * from the liability imposed and any * * * railroad * * * so receiving property for transportation or any * * * railroad * * * delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading * * * for the full actual loss, damage or injury to such property caused by it or any such * * * railroad * * * to which such property may be delivered notwithstanding any limitation of

liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading * * *; and any such limitation without respect to the manner or form in which it is sought to be made is declared to be unlawful and void * * * provided further that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law; * * *"

Title 49 United States Code, Section 101:

"The carrier may also by inserting in the bill of lading the words 'Shipper's weight, load, and count,' or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading."

## STATEMENT.

The petitioner Armour Research Foundation of Illinois Institute of Technology commenced this action in the Municipal Court of Chicago and the defendant Chicago Rock Island and Pacific Railroad Company duly removed the action to the United States District Court. The petitioner's action sought to recover damages to a shipment received by defendant as a delivering carrier for transportation in interstate commerce. The defense was that the damage if any was caused by the plaintiff or its agents.

The shipment was described on the Bill of Lading as "One Ea. Vehicle Motor Truck, Freight Trailer Attached." The United States District Court found, after a non jury trial, that the shipment was misdescribed in that the Bill of Lading under which the shipment was being transported failed accurately to describe the shipment since it did not disclose to the carrier either the contents of the van of the motor truck or the delicate nature of the electronic equipment which constituted its contents. The District Court concluded that this misdescription of the shipment resulted in a breach of contract of carriage because the carrier did not know of or have the opportunity to examine the contents of the van. On this finding the District Court, entered judgment for the defendant.

Plaintiff appealed on the ground that such conclusion was an improper interpretation of law. The Court of Appeals following *New York Central R.R.* v. *Goldberg*, 250 U.S. 85 reversed the District Court judgment and held that the defendant railroad was liable for goods damaged

in transit even though the shipment was innocently misdescribed in the Bill of Lading. The Court of Appeals in addition to reversing, remanded the case to the District Court directing the court to make definitive and ultimate findings on two issues which the Court of Appeals said were issues on which plaintiff had the burden of proof, namely: (1) delivery to the carrier in good condition and (2) the absence of latent and concealed defects not discoverable by ordinary observation on the part of the carrier, where the plaintiff loaded the shipment.

On remandment no further testimony was had in the District Court and after argument, the court entered new findings against plaintiff on both such issues, and entered judgment for defendant. Plaintiff again appealed to the Court of Appeals on the ground, among others, that the defendant carrier is absolutely liable for loss or damage to a shipment delivered into its possession unless it affirmatively shows that the damage was occasioned by the shipper, the only defense alleged. Furthermore, plaintiff contended that the defendant carrier has the duty of inspecting all shipments delivered to it, and can only relieve itself from such duty by placing on the Bill of Lading an exception showing "Shipper's weight, load, and count, or other words of like purport."

The Court of Appeals affirmed the District Court findings, in effect holding the common carrier free of any duty to inspect goods delivered to it and free of any duty to properly load under a Uniform Straight Bill of Lading without exceptions. It is contended that the foregoing creates new exceptions to a common carrier's liability unknown to the common law and is in conflict with the laws of the United States and decisions of this Court.

## REASONS FOR GRANTING WRIT.

By seemingly reasonable and considered interpretations of fact questions the State Courts, District Courts and Courts of Appeals are gradually removing the absolute liability of a common carrier for loss or damage to shipments delivered into its possession for carriage, and engrafting on carrier law a new concept not provided by statutory or common law and not in conformity with the opinions of the Supreme Court of the United States interpreting such law.

Under the language used in certain decisions of the lower courts there is no longer absolute liability for loss or damage on the part of the carrier when shipments are received by the carrier for shipment under a Uniform Straight Bill of Lading with no exceptions. *Armour Research* v. *Chicago Rock Island and Pacific Railroad Company*. 297 F. 2d 176. Appendix A infra p. 13.

The judgment of the Court of Appeals in this case baldly states that the shipper has more to do, and consequently more to prove in case of damage, than to establish delivery to and acceptance by the carrier and the amount of damage. It further baldly states that unless the shipper does and proves these things that the carrier is not liable. There is nothing in the decision of the Court of Appeals that would prevent it from being used in every carrier case as authority for the proposition that the carrier is only liable in the event the shipper eliminates all possibilities of a conclusion other than the carrier's negligence.

If this decision is permitted to stand, the carrier can now always defend by making the shipper prove that the shipment was in good condition, a practically unmeasurable element, and that the loss was not caused by the loading of the shipment. The carrier would have no risk of loss or damage since in all cases, whether or not the duty is knowingly assumed by the shipper, the shipper must always be able to show that the loss was not caused by the shipper.

Under the Court of Appeals decision the common carrier is no longer an insurer against loss or damage. The carrier is rather a favored litigant who, although it receives generous fixed rates for transportation and controls and has possession of the shipment from the time of its acceptance for transportation, can now always say that the loss was caused because the shipment was not in good condition or that the shipper didn't properly load the shipment.

It is submitted that the new quantum of proof that would be required and the possibility of counter proof on these extraneous points would exceed the proof necessary to prove a carrier negligent and would not be controlled by the well established rules of evidence present in a negligence case.

It is petitioner's claim that the carrier has a duty to inspect and provide against alleged defective loadings in all cases where the carrier does not specifically relieve itself of such duty under the provisions of Title 49 U.S.C., Section 101.

The Supreme Court in the early case of *Hannibal* v. *Swift*, 79 U.S. 262 (1870), recognized this duty by stating at p. 273:

"In all such cases the liability of the common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded. The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. The consequences of his neglect in these particulars cannot be transferred to the owner of the property."

*Hart* v. *Pennsylvania Railroad Company*, 112 U.S. 331 (1884) page 340:

"As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them."

*Chicago & Eastern Illinois Railroad Company* v. *Collins Produce Company*, 249 U.S. 186 at page 192:

"The duties and liabilities of a common carrier have been so fully discussed by this court, notably in *Railroad Company* v. *Lockwood*, 17 Wall 357, and in *Bank of Kentucky* v. *Adams Express Co.*, 93 U.S. 174, that they need not be restated here. The common law principle making the common carrier an insurer is justified by the purpose, to prevent negligence or collusion between dishonest carriers or their servants and thieves or others to the prejudice of the shipper who is of necessity, so remote from the property, when in transit, that proof of such collusion or negligence when existing would be difficult if not impossible."

*Secretary of Agriculture* v. *United States*, 350 U.S. 162 on page 165:

> "It is conceded that Sec. 20(11) codifies the common law rule making the carrier liable, without proof of negligence, for all damages to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, Acts of God, the public enemy, public authority or the inherent vice or nature of the commodity. See, e.g., Bills of Lading 52 ICC 671, 679; *Chesapeake & O. R. Co.* v. *Thompson Mfg. Co.*, 270 U.S. 416, 421-422; *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 506-507, 509."

The fact that the carrier did not know the nature of the shipment presented to it for carriage is not a factor, in the absence of fraud on the part of the shipper, which would relieve the carrier from liability for loss or damage to the shipper. *New York Central R.R.* v. *Goldberg*, 250 U.S. 85 (1919); *Hart* v. *Pennsylvania*, 112 U.S. 331 (1884); *Armour Research Foundation* v. *Chicago Rock Island and Pacific Railroad Company*, 297 F. 2d 176 (1961).

A fortiori, if lack of knowledge of the nature of the shipment cannot relieve the carrier for loss or damage, then lack of knowledge concerning the condition of the shipment or loading of the shipment should not be the basis of a defense available to the carrier when loss or damage occurs, unless there is evidence of fraud on the part of the shipper or unless the carrier has such defense made available to it by following the provisions of Title 49 U.S.C., Section 101.

The importance of the questions presented by this petition are evident in view of the now new exceptions to the common carrier's liability which are being given acceptance by lower courts. If justice is to be obtained by shippers it can only be obtained in the lower courts, which

courts have persisted in creating a fact issue where there is none. Fact issues concerning an act of the shipper, other than fraud, in connection with condition of a shipment or loading, in an attempt to relieve the carrier from loss or damage to the shipment, are issues that should not be considered.

As interpreted by the Court of Appeals in the present case each carrier case is now an ordinary negligence action with the burden on the shipper of proving freedom from negligence on the part of the shipper. This interpretation is a complete abrogation of the absolute liability concept which is fundamental to carrier law as interpreted by the Supreme Court. Deviation by the lower federal courts such as are present here, which are not prevented by this Court can only lead to confusion in the minds of shippers as to their rights and duties, and a relaxation of the standards on the part of the carriers with consequent injury to the general public.

## CONCLUSION.

For the foregoing reasons the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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TIMOTHY J. MURTAUGH,
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*Attorneys for Petitioner.*

MURTAUGH & NELSON,
*Of Counsel.*

# APPENDIX A.

## OPINIONS BELOW.

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 13404 SEPTEMBER TERM, 1961 SEPTEMBER SESSION, 1961

| | |
|---|---|
| ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY, *Plaintiff-Appellant*, v. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Defendant-Appellee*. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

Before DUFFY, KNOCH and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. Plaintiff, Armour Research Foundation of Illinois Institute of Technology, brought this action against defendant, Chicago, Rock Island and Pacific Railroad Company, to recover damages to a shipment received by defendant for transportation in interstate commerce. Plaintiff alleges that on April 22, 1957, Southern Pacific Lines issued a uniform bill of lading on behalf of plaintiff for transportation from Inyokern, Cali-

fornia, to Chicago, of a shipment described as: "1 Ea. Vehicle Motor Truck Freight Trailer Attached" and that defendant as connecting carrier delivered this shipment in a damaged condition. The defense was that the damage, if any, was caused by the plaintiff or its agents. Judgment was entered for defendant by the District Court after a non-jury trial. This appeal followed.

The vehicle in question was owned by Armour and employed for housing and transporting delicate electronic equipment which was used in making certain tests at the Naval Ordnance Test Station at China Lake, California. The exterior of the truck was rectangular in shape. It had a back door similar to an entrance door to a room and each side contained three panels in the shape of windows in addition to cable-entry portholes. The District Court found that the van of the truck was so unusual that it could be recognized as a special purpose truck.

On April 18, 1957, the Navy shipping supervisor at China Lake ordered a flat car from the Southern Pacific Lines preparatory to returning the vehicle to Armour in Chicago. Navy crews loaded and secured the padlocked vehicle on the flat car and transported it via Navy railroad to the Southern Pacific at Inyokern on April 22. A bill of lading was issued there by the agent of the Southern Pacific. Based on information supplied by Navy personnel, the agent listed only the truck and trailer on the bill. No mention was made of any equipment inside the truck. On April 23, the car was inspected by a member of the railroad's car department who reported that the blocking and tie cables used to secure the vehicle were "okay." The car was then released for movement. Subsequently, the car was transferred to the defendant's line at Tucumcari, New Mexico, and arrived at Chicago on April 30.

Neither the truck nor the trailer was damaged and the blocks and tie cables were in place with the exception of one tie cable which was still fastened to the rear axle but was not tight. When plaintiff unlocked the truck it discovered that some of the electronic equipment, however, had been damaged. Upon learning that the truck was not empty defendant rerated the shipment to reflect the higher freight rate applicable to the carrying of a truck loaded with sensitive and delicate equipment, to wit, electronic devices and cameras. This higher rate was paid by plaintiff.

Section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11), codifies the common law rule that a common carrier is an insurer of the goods transported by it unless it is affirmatively shown that "the damage was occasioned by the shipper, acts of God, the public enemy, public authority, or the inherent vice or nature of the commodity." *Secretary of Agriculture* v. *United States*, 350 U.S. 162.

The District Court found that the shipment was "misdescribed in that the bill of lading under which the shipment was being transported failed accurately to describe the shipment since it did not disclose to the carrier either the contents of the van of the motor truck or the delicate nature of the electronic equipment which constituted those contents." The Court concluded that this misdescription of the shipment resulted in a breach of contract of carriage by the shipper since the carrier did not know of or have an opportunity to examine the contents of the van.

Plaintiff contends that this conclusion is an improper interpretation of the law and maintains that a proper interpretation would lead to the conclusion that the railroad cannot escape liability for goods damaged in transit

even though the goods are innocently misdescribed in the bill of lading. Plaintiff cites *New York Central R.R.* v. *Goldberg,* 250 U.S. 85, in support of its proposition. In *Goldberg* a carton which actually contained furs, but which was innocently misdescribed in the bill of lading as containing dry goods, was lost in transit. The Supreme Court held that "a misdescription of the character of the goods, not attributable to fraud, merely imposed upon the shipper or consignee an obligation to pay freight charges according to the character of the goods actually shipped, and did not affect the liability of the carrier for a failure to deliver the goods."

Defendant attempts to distinguish *Goldberg* from this case on the ground that the shipment in *Goldberg* was lost and therefore neither the box nor its contents, however described, were delivered; while on the other hand, in the instant case, the railroad delivered a truck and trailer as described in the bill of lading as well as the contents therein, except that the undescribed contents were damaged in transit.

In view of the fact that Section 20(11) of the Interstate Commerce Act imposes liability for loss *or* damage to goods and in view of the finding by the District Court that the misdescription was unintentional, we fail to see how *Goldberg* can be distinguished from the instant case. Accordingly, we are compelled to reverse.

Plaintiff, however, to maintain this suit, must bear the burden of proof in two respects. First, it is established law that the burden rests on the shipper to prove delivery to the carrier in good condition. *Hoover Motor Express Co.* v. *United States,* 6 Cir., 262 F. 2d 832. Second, when the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects in

loading which are latent and concealed, and which cannot be discovered by ordinary observation on the part of the carrier. *United States* v. *Savage Line, Inc.*, 4 Cir., 209 F. 2d 442.

The District Judge at the end of the trial made an oral statement in which he said, *inter alia*, "I want to bring this to a head. I want to find and my judgment is that the evidence sufficiently shows that this went across the country once, and I think for ordinary transportation, it was sufficiently shipped and packed. But I do not believe the evidence warrants the finding that it was sufficiently packed and fixed up for the type of electronic equipment, highly sensitive instruments that they were." However, this expression is nowhere recapitulated in the findings of fact and conclusions of law, as such. Furthermore, there is nothing contained in the findings with regard to the condition of the truck at the time it was accepted for shipment by the Southern Pacific, except for the cryptic statement, "Nothing was loose in the truck when delivered to the defendant."

In the absence of definitive and ultimate findings by the trial court on these two disputed issues of fact, we cannot say as a matter of law that plaintiff has carried the burdens to which we have referred. Accordingly, the case must be remanded for the purpose of enabling the trial court to make necessary findings vital to a decision of the cause. *McClure* v. *O'Henry Tent and Awning Co.*, 7 Cir., 184 F. 2d 636. Reversed and remanded.

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 13809 SEPTEMBER TERM AND SESSION, 1962

ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY,

*Plaintiff-Appellant,*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 2, 1963.

Before DUFFY, KNOCH and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* In our decision, 297 F. 2d 176 (7th Cir. 1961), we remanded the case to the District Court to "make necessary findings vital to a decision of the cause." The trial judge, in conformity with our mandate, set aside the original judgment; made additional findings of fact[1] and conclusions of law; and entered a new judgment for defendant. From this latter judgment plaintiff now appeals.

[1] In addition to the findings referred to in our former opinion, the trial judge found:

"The shipment was misdescribed in that the bill of lading under which the shipment was being transported failed accurately to describe the shipment since it did not disclose to the carriers either the contents of the van of the motor truck or the delicate nature of the electronic equipment which constituted those contents. The carriers did not know

*(Opinion)*

We believe the evidence and the reasonable inferences to be drawn therefrom warranted the trial judge in finding that plaintiff had failed to prove that the contents of the motor truck were in good condition when initially delivered to the Southern Pacific. A finding that the goods were undamaged when delivered to the Southern Pacific would have been predicated on mere speculation and conjecture.[2]

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of or have an opportunity to examine the contents of the van. The carriers, by ordinary observation, could not determine that there was any particular kind of equipment within the van of the motor truck.

"The evidence does not establish that the contents of the motor truck were in good condition when delivered to the Southern Pacific at Inyokern, California.

"Plaintiff assumed the responsibility of loading. The evidence does not warrant the finding that the contents of the van of the motor truck (highly sensitive electronic equipment and instruments) were sufficiently packed and fixed up for rail transportation.

"The electronic equipment was loaded in the motor truck by the plaintiff without any dunnage, bracing, supports or straps. Plaintiff failed to properly load and secure the electronic equipment for rail transportation. The defects in loading were latent and concealed and could not be discovered by ordinary observation on the part of the carriers."

[2] The electronic equipment was first loaded on the truck on March 20, 1957 (almost five weeks prior to delivery to the Southern Pacific), at the Naval Ordnance Test Station at China Lake, California. The truck was padlocked on March 25, and thereafter was never opened until it reached its final destination in Chicago. On April 8, the padlocked truck and trailer was driven about twelve miles from the test site to the China Lake shipping area. Some ten days later, on April 18, 1957, the Navy shipping supervisor at China Lake ordered a flat car from Southern Pacific. Navy crews loaded and secured the padlocked vehicle on the flat car and transported it via Navy railroad to the Southern Pacific at Inyokern, California. The Southern Pacific accepted the flat car with the still-padlocked truck thereon, for transportation on April 22.

*(Opinion)*

Possible defects resulting from the original loading were obviously not discoverable by ordinary observation. The truck was padlocked so that it could not be entered. The bill of lading said nothing about the contents of the truck. These circumstances, we believe, relieved the carrier of any obligation to ascertain the contents of the truck or to discover whether these contents were properly packaged for rail shipment. They further placed upon plaintiff the burden of proving that the packaged contents were properly loaded and secured within the truck for rail shipment. We think the trial judge's finding that plaintiff did not meet that burden is supported by evidence in the record and hence is not clearly erroneous.

Plaintiff in this appeal also contends that the denial of defendant's motion for a finding at the close of plaintiff's case under Rule 41(b), F. R. Civ. P., constituted a finding in its favor which was conclusive and could not thereafter be disturbed by the trial judge. As we view it, a denial of defendant's motion amounts to nothing more than a refusal to enter judgment at that time. At most it constituted a tentative and inconclusive ruling on the quantum of plaintiff's proof. Certainly it did not preclude the trial judge from later making considered findings and determinations not altogether consistent with his prior tentative ruling.

The judgment of the District Court is AFFIRMED.

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

# APPENDIX B.

## JUDGMENTS BELOW.

144 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 58 C 1083) * *

JUDGMENT of March 3, 1961.

This cause having come on for trial, and the Court having heard the evidence and the arguments of counsel and having made its Findings of Fact and Conclusions of Law:

The Court finds the issues in favor of defendant, Chicago, Rock Island and Pacific Railroad Company and against the plaintiff, Armour Research Foundation of Illinois Institute of Technology.

It is therefore Ordered, Adjudged and Decreed that judgment be and it is hereby entered in favor of defendant, Chicago, Rock Island and Pacific Railroad Company, against plaintiff, Armour Research Foundation of Illinois Institute of Technology and that defendant have and recover from the plaintiff its costs in the cause.

Enter: /s/ J. S. Perry
Judge

Dated: Chicago, Illinois March 3, 1961

*(Judgments)*

171 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 58 C 1083) • •

JUDGMENT of March 13, 1962.

This cause having come on for trial, and the Court having heard the evidence and the arguments of counsel and having made its Findings of Fact and Conclusions of Law:

The Court finds the issues in favor of defendant, Chicago, Rock Island and Pacific Railroad Company and against the plaintiff, Armour Research Foundation of Illinois Institute of Technology.

It is therefore Ordered, Adjudged and Decreed that judgment be and it is hereby entered in favor of defendant, Chicago, Rock Island and Pacific Railroad Company, against plaintiff, Armour Research Foundation of Illinois Institute of Technology and that defendant have and recover from the plaintiff its costs in the cause.

Enter: /s/ J. S. Perry
Judge

Dated: Chicago, Illinois March 13, 1962

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

## No. 847

ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY,

*Petitioner,*

*vs.*

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX.

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THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

**No. 847**

ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY,

*Petitioner.*

*vs.*

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### OPINION BELOW.

The first decision of the Court of Appeals remanded the case to the District Court to make necessary findings of fact vital to a decision of the cause, to wit, findings as to delivery to the carrier in good condition and as to latent and concealed defects in loading. *Armour Research Foundation* v. *Chicago, R. I. & P. R. R. Co.*, 7 Cir., 297 F. 2d 176, 179.

The second decision of the Court of Appeals affirmed the judgment of the District Court upon the ground that the findings of fact of the District Court made in conformity

with the mandate of the first decision of the Court of Appeals were not clearly erroneous.

*Armour Research Foundation* vs. *Chicago, R. I. & P. R. R. Co.*, 7 Cir., 311 F. 2d 493, 494.

## QUESTION PRESENTED.

In an action to recover damages to a shipment transported by common carriers in interstate commerce, must the evidence establish that the shipment was in good condition when delivered to the initial carrier for movement?

## STATUTES INVOLVED.

In addition to the statutes referred to in petitioner's petition, this proceeding involves 28 U. S. C. 2101(c) (Act of June 25, 1948, 62 Stat. 961), which provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding, before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

## STATEMENT.

Petitioner's statement is accurate and complete enough until it reaches the point of the first decision in this cause. The statement is best corrected from that point on by a complete statement by respondent.

Petitioner filed a petition for rehearing after the first decision of the Court of Appeals. The grounds for that petition, which was denied over one year prior to the filing of the petition for certiorari, were identical to those raised herein (Supp. App. ). Petitioner made no effort at that

time to bring this cause to this Court by filing a timely petition for a writ of certiorari.

In conformity with the mandate of the first decision, the trial court made the following findings of fact (311 F. 2d 493, 494):

> The evidence does not establish that the contents of the motor truck were in good condition when delivered to the Southern Pacific at Inyokern, California.
>
> Plaintiff assumed the responsibility of loading. The evidence does not warrant the finding that the contents of the van of the motor truck (highly sensitive electronic equipment and instruments) were sufficiently packed and fixed up for rail transportation.
>
> The electronic equipment was loaded in the motor truck by the plaintiff without any dunnage, bracing, supports or straps. Plaintiff failed to properly load and secure the electronic equipment for rail transportation. The defects in loading were latent and concealed and could not be discovered by ordinary observation on the part of the carriers.

Judgment in accordance with the findings of fact was entered for respondent, and, upon petitioner's appeal, the judgment was affirmed upon the ground that the findings of fact were not clearly erroneous (311 F. 2d 493, 494).

## REASONS FOR DENYING THE WRIT.

### I.

### THE PETITION FOR CERTIORARI WAS NOT FILED WITHIN THE TIME PRESCRIBED BY LAW.

A writ of certiorari intended to bring any judgment before this Court for review must be applied for within 90 days after the entry of the judgment, unless the time has been extended by a Justice of the Court, 28 U. S. C. 2101(c).

The petition for rehearing in the first decision was denied on February 1, 1962. The petition for writ of certiorari was filed February 21, 1963. No extension of time was sought.

It is the first decision about which petitioner complains here. The second decision is confined to the scope of review under Rule 52(a) of the Federal Rules of Civil Procedure. The second decision merely holds that the findings of fact of the trial court are supported by the evidence.

The arguments made in the petition for certiorari are the same as those raised in the petition for rehearing filed after the first decision in this case, which petition was denied over one year prior to the filing of the petition for certiorari.

It results that the petition for certiorari was not filed within the time prescribed by law.

II.

**THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.**

The evidence in this cause did not establish that the contents of the motor truck were in good condition when delivered to the Southern Pacific at Inyokern and, accordingly, judgment was entered for respondent (311 F. 2d 493, 494). In an action to recover damages to a shipment transported by a common carrier in interstate commerce, this Court has uniformly held that the evidence must establish that the shipment was in good condition when delivered to the carrier for movement. *Chicago & N. W. Ry. v. Whitnack Co.*, 258 U. S. 369, 371; *C. & O. Ry. Co. v. Thompson Mfg. Co.*, 270 U. S. 416, 422.

Petitioner, at page 8 of its petition, baldly asserts that the shipper should not be required to prove good condition. There is no conflict between the Court of Appeals decision and decisions of this Court. Petitioner's erroneous assertion cannot invoke the jurisdiction of this Court.

It is perhaps petitioner's contention that the reception of the bill of lading in evidence proved that the unknown, undescribed contents of the motor truck were in good condition. Such a contention finds no support in any of the cases cited by petitioner.

The bill of lading expressly provided that the condition of the contents was unknown. This Court, in *Clark, et al. v. Barnwell, et al.*, 12 Howard 272, 283, held that a bill of lading containing such a provision does not constitute proof of the good condition of the contents. This holding has been followed in *The Niel Maersk*, 2 Cir., 91 F. 2d 932; *Albers Bros. Milling Co. v. Hauptman*, 9 Cir., 95 F. 2d 286.

Petitioner asserts that it is the carrier's duty to discover the existence of undescribed contents and the manner in which they are loaded. This assertion finds no support in any of the cases cited by petitioner and is just another attempt by petitioner to ignore the finding of the trial court, which was affirmed upon appeal, that ordinary observation of the described shipment would not reveal the existence of contents nor the manner in which any such contents were loaded (311 F. 2d 493, 494).

Petitioner claims that 49 U. S. C. 101 provides that a carrier may relieve itself of the duty to inspect and to provide against defective loading only by marking the bill of lading "shipper's weight, load and count", and that unless the bill of lading is so marked the carrier does not have the defense of improper loading available to it. Petitioner cites no authority whatever for these novel arguments, and in fact does no more than state its position completely without benefit of logical development.

The only goods described in the bill of lading were a motor truck and trailer. The notice "shipper's weight, load and count" would have been a useless act under the circumstances in that the carriers did not know or should have known of the existence of any contents.

## CONCLUSION.

It is respectfully submitted that the petition for writ for certiorari should not be denied because it was not filed within ninety days from the first judgment of the Court of Appeals, and because the decision of the Court of Appeals is not in conflict with applicable decisions of this Court.

Respectfully submitted,

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## SUPPLEMENTAL APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 13404

| | |
|---|---|
| Armour Research Foundation of Illinois Institute of Technology, *Plaintiff-Appellant*, *vs.* Chicago, Rock Island and Pacific Railroad Company, *Defendant-Appellee.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. — Honorable J. Sam Perry, Judge Presiding. |

## PETITION FOR REHEARING.

### I.

It is respectfully submitted that the plaintiff in its original brief on page 12 set out an exact quotation from a Supreme Court decision as follows:

> *Secretary of Agriculture* v. *United States*, 350 U. S. 162, footnote 9 beginning on page 165: "It is conceded that Sec. 20(11) codifies the common law rule making a carrier liable, without proof of negligence, for all damages to the goods transported by it, *unless it affirmatively shows* that the damage was occasioned by the shipper, Acts of God, the public enemy, public authority or the inherent vice or nature of the commodity. See, *e.g.* Bills of Lading 52 ICC 671, 679;

*Chesapeake & O. R. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, 421-422; *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 506-507, 509."

It is further respectfully submitted that this court in its opinion apparently did not consider the pertinent words which are italicized. These words, "unless it affirmatively shows" mean that unless the defendant carrier affirmatively shows, and cannot reasonably be subject to any other interpretation.

The defendant accepted this burden in its second defense, which is an affirmative defense, which states:

> "Plaintiff's loss or damage, if any, were caused by the acts of plaintiff, shipper, their agents or employees."

This issue was argued before the trial court. If the trial court, after considering the evidence at the close of the plaintiff's case or at the close of all of the evidence had determined that the evidence supported the defendant's affirmative defense, then this case could have easily and summarily been disposed of by an affirmative finding that the shipment delivered to the defendant carrier was in improper condition or that there was a latent defect. The trial court's conclusion of law as to the misdescription of the shipment would not have been needed or necessary.

## II.

It is further respectfully submitted [that whatever distinctions, raised by particular cases on particular fact situations, may have been made by other courts,] the law as laid down by the Supreme Court in *Hannibal* v. *Swift*, 79 U. S. 262 and cited in the plaintiff's original brief on page 17 is still the law, and that such law is supported by the decision in *Secretary of Agriculture* v. *United States*, cited above.

It is further respectfully submitted that the decision of the Supreme Court in *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331, also cited by the plaintiff in its original brief on page 17, is another clear statement of the principle announced in *Hannibal* v. *Swift*, and a further pronouncement of its reasonableness.

If the defendant carrier wanted to shift the burden of showing proper loading or proper commodity to the plaintiff shipper, there is adequate provision in the Bill of Lading Act for such shifting.

Section 21, Bill of Lading Act, 49 U.S.C.A., Section 101:

> "The carrier may also by inserting in the bill of lading the words 'Shipper's weight, load, and count,' or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading."

It is contended that it is established law that proof of delivery and damage is the plaintiff's burden and that the defendant in order to take advantage of the exceptions to its liability as an insurer must bear the burden of proof.

There is not one finding of fact that would support the defendant's affirmative defense. The absence of such finding is more than a presumption that there were no facts to support it.

III.

In the findings of fact, the trial court found as follows:

> 5. On April 22, 1957, at 5:00 P.M., Southern Pacific Lines received at Inyokern, California, from Director of Supply, Naval Ordnance Test Station, China Lake, California, the aforesaid property and issued its Bill of Lading.
>
> 19. The electronic devices, cameras, and equipment, contained in the van were damaged to the extent of $8,091.40.

These are the two affirmative findings necessary to establish the plaintiff's prima facie case. They are definitive and ultimate facts. All other findings except such findings as were necessary for consideration of the conclusion of law with reference to the misdescription of goods in the Bill of Lading were surplusage.

To penalize the plaintiff because findings with reference to the defendant's affirmative defense were not made by the trial court would in effect be permitting the defendant to reargue issues that have once been decided in favor of the plaintiff.

## CONCLUSION.

The plaintiff respectfully submits that judgment in the amount of $8,091.40 should be entered in favor of the plaintiff and that the case should not be remanded.

Respectfully submitted,

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